JUN 9 PAGE 6

CASE NO. 82-6370

Office - Supreme Court, U.S.
FILED
JUN 7 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

BENITO MARRERO,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE ELEVENTH CIRCUIT COURT OF APPEALS

Donald S. Cambas, Esquire
Post Office Box 24317
5200 W. Kennedy Blvd.
Tampa, FL 33623
Attorney for Petitioner

TABLE OF CONTENTS

CASES

	PAGE
ARGUMENT	1-3
CONCLUSION	3
CERTIFICATE OF SERVICE	3

TABLE OF CITATIONS

	PAGE
Bonner v. Henderson, 517 F.2d 135 (5th Cir. 1975)	2
Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966)	3
Marrero v. State, 343 So.2d 883 (Fla 2d DCA 1977)	2
Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed. 2d 382 (1980)	1-2
Strader v. Blalock, 405 F. Supp. 1155 (D.C.W.D., Va. 1975)	2
United States v. Moss, 631 F.2d 105 (8 Cir. 1980)	2
Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1482, 63 L.Ed. 2d 715 (1980)	1

STATUTE

28 U.S.C.A. 22 54(d)	3

ARGUMENT

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. THE LOWER COURTS ERRED IN DENYING HABEAS RELIEF IN THAT THE IMPOSITION BY THE FLORIDA TRIAL COURT OF MAXIMUM CONSECUTIVE SENTENCES TOTALING TWO HUNDRED AND FORTY (240) YEARS CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE PROVISIONS OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner would urge that the imposition upon him of a two hundred and forty (240) year sentence, in light of the unique facts of his case, constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The conclusion is inescapable that no less than extraordinary circumstances were present; to wit:

1. The premises of a single motel were involved.
2. There was no violence toward another person.
3. The offences occurred on three days in late June and early July, 1975.
4. Twenty-four (24) separate counts were included. (Twelve each of breaking and entering and of grand theft).
5. Maximum consecutive sentences on all counts were imposed by the trial judge, in his discretionary capacity, for a total of two hundred and forty (240) years.

In Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), the defendant, Rummel, had been adjudicated guilty of three (3) separate crimes which were committed over a time span of nine (9) years and, prior to the third conviction, had been imprisoned twice. The fact that he had committed a third felony, under the rationale of the Texas recidivist statute involved, demonstrated that Rummel's imprisonment did not deter him from crime upon his release. Rummel, at 445 U.S. 278, 100 S.Ct. 1141, 63 L.Ed.2d 393-394. The crimes of which Petitioner herein was convicted were all committed during a limited time span, in June and July of 1975, unlike the situation in Rummel. In addition, Petitioner's consecutive sentences were imposed by the trial judge in his discretionary capacity, whereas, in Rummel, the Texas recidivist statute mandated a life sentence under certain carefully defined circumstances.

The case of Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), also cited by Respondent, turned upon the application of the Double Jeopardy Clause of the Fifth Amendment in appeals challenging multiple punishment. The Whalen holding that

the imposition of consecutive sentences for rape and for first-degree murder for killing the same victim in the perpetration of the rape was erroneous, clearly is not dispositive of the instant Petition.

Petitioner submits that the cases of Strader v. Blalock, 405 F.Supp. 1155 (D.C.W.D., Va. 1975); Bonner v. Henderson, 517 F.2d 135 (5th Cir. 1975); and United States v. Moss, 631 F.2d 105 (8th Cir. 1980), do not negate or circumvent Petitioner's argument herein that his sentence of two hundred and forty (240) years constituted cruel and unusual punishment under the Eighth Amendment. In Strader, the court noted that the thirteen (13) year sentence of the Petitioner therein was well within statutory limits, in that Strader could have received a sentence of one hundred and twenty (120) years confinement. Bonner involved a sentence of life imprisonment in a murder case. In Moss, there was a twenty-five (25) year sentence for 12 mail/wire offences.

Petitioner again submits that his two hundred and forty (240) year sentence represents an "extreme example" of punishment disproportionate to the crime as contemplated in Rummel (supra), 445 U.S. at 274 n.11, 100 S.Ct. 1139 n.11, 63 L.Ed.2d at 39 n.11.

2. THE LOWER COURTS ERRED IN DENYING HABEAS RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING OR MAKING AN INDEPENDENT DETERMINATION OF THE VOLUNTARINESS OF PETITIONER'S CONFESSIONS.

Neither the District Court nor the Circuit Court below made any comment or determination as to the question of the voluntariness of Petitioner's inculpatory statements; and, no evidentiary hearing was held in the District Court. Petitioner has consisently argued that the finding in the State Court evidentiary hearing (Appendix D) was not supported by the record as a whole, and that the material facts were not adequately developed. The decision of Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977), reviewed Petitioner's November 20, 1975 State Court conviction of possession of narcotics paraphanalia in the same court, before the same judge, and with the same jury venire which had been connected with his trial and conviction the day before, November 19, 1975, of the crimes with which the instant Petition is concerned. In the November 20, 1975 trial, Petitioner, among other things, was required to exhibit to a

policeman, in the presence of the jury, needle or "track marks" on his arms. Material facts were not adequately developed at the State motion to suppress hearing in the instant case (Appendix D), both as to Petitioner's drug use and as to promises of leniency allegedly made to him by the State. 28 U.S.C.A. Section 2254(d). It is submitted that the denial of habeas relief without the benefit of an evidentiary hearing or of an independent determination of the voluntariness of the Petitioner's inculpatory statements was error. 28 U.S.C.A. 2254 (d); Davis V. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895 (1966). The transcript of the State Court motion to suppress hearing reveals, in addition, that there had been a discussion as to the Petitioner's desire to make a deal in order to protect his girl friend from criminal charges, although Assistant State Attorney Robert Cole testified that the discussion came up only after any admissions or statements had been made by Petitioner, and that no promises had been made to Petitioner. As was argued by Petitioner, through counsel, at the State Court motion to suppress hearing, " it appears to me that a person would not make such an offer after giving away his position and it was on the reliance that Mr. Marrero did make the statements at the State Attorney's Office." Appendix D at pages 34-35.

CONCLUSION

For the foregoing reasons, along with those in the initial Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

D. S. Cambas

DONALD S. CAMBAS
P.O.Box 24317
5200 West Kennedy Blvd.
Tampa, Florida 33623
(813) 870-7733
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Peggy A. Quince, Esq., 1313 Tampa Street, Suite 804, Tampa, Florida 33602, this 6 day of June, 1983.

D. S. Cambas

DONALD S. CAMBAS